Supreme Court, U.S.
FILED
APR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1985

MARY HAYSSEN, ALLEN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA

Respondent.

/

LOREN M. BERRY,

Real Party In Interest

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Court of Appeal State of Calfiornia First Appellate District

---

GREGORY P. EINHORN, ESQ.
TARKINGTON, O'CONNOR & O'NEILL
350 "E" Street, Suite 200
Santa Rosa, CA 95404
Telephone: (707) 576-1380

Attorneys for Respondent.

20 pp
fold out

NO. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1985

MARY HAYSSEN, ALLEN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA

Respondent.

/

LOREN M. BERRY,

Real Party In Interest

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Court of Appeal State of Calfiornia First Appellate District

---

GREGORY P. EINHORN, ESQ.
TARKINGTON, O'CONNOR & O'NEILL
350 "E" Street, Suite 200
Santa Rosa, CA 95404
Telephone: (707) 576-1380

Attorneys for Respondent.

QUESTION PRESENTED

1. Did the trial court and California Court of Appeal apply the correct standard of review in determining that the notice procedures employed by the County of Sonoma, Board of Zoning Adjustments, as a prerequisite to a use permit hearing, comlied with due process requirements?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	
OPINION BELOW	2
STATEMENT OF CASE	2
ARGUMENTS FOR DENYING THE PETITION	5
I. The Courts Below Applied The Correct Standard of Of Review To the Facts Before Them The Notice Employed Was Constitutional	5
II. Despite Appellants' Arguments, Neither Mullane Nor Its Progeny Require Personal Notice: The Mullane Standard Was applied By The Courts Below	7
III. The Notice Procedure Utilized Exceeded Existing State Law And Local Regulation Granting This Writ Would Jeopardize Innumerable Administrative Hearing	8
IV. Post Adjudicatory Rights Contained In The Use Permit Merely Provide An Additional Basis For Finding The Notice Method Used Was Adequate	11
V. Posting And Such For A Publication Are Especially Proper In Situations Involving Land Use Administration	12
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Cases	
Greene v. Lindsey (1982) 456 U.S. 444	6
Mullane v. Central Hanover Tr. Co. (1950) 339 U.S. 306	5
Schroeder v. New York (1962) 371 U.S. 208	7
Anderson National Bank v. Luckett (1944) 321 U.S. 233	6
Horn v. County of Ventura (1979) 24 Cal.3d 605	7
Newberry Springs Water Association v. County of San Bernardino (1984) 150Cal.App,3d 740	10
Zartman v. Reisem (1977) 399 N.Y.S.2d	13
Retzler v. County Executive (1971) 324 N.Y.S.2d 393	13
Cook v. Marple Tp. Zoning Hearing Board (Penn. 1980) 483 A.2d 1105	13
Statutes and Ordinances	
Cal. Gov. Code §65905	9
Sonoma County Local Ordinance 203.1.	10

NO. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1985

MARY HAYSSEN, ALLEN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA

Respondent.

/

LOREN M. BERRY,

Real Party In Interest

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI
To The Court of Appeal
State of Calfiornia
First Appellate District

Respondent the Board of Zoning Adjustments of the County of Sonoma (hereinafter referred to as the "BZA") hereby respectfully opposes the Petition for Certiorari filed with the court by petitioners Mary Hayssen, Allen B. Goldsmith, Jeanie A.

Goldsmith, Harvey Zoet, Barbara Larson, Roberts L. Larson and Edward Hartnett, and pray that the Writ of Certiorari be denied.

OPINION BELOW

Petitioners claim constitutional error in the opinion of the Court of Appeal , the State of California, First Appellate District. This opinion is appended to petitioners' Writ of Certiorari.

STATEMENT OF CASE

Despite the tremendous briefing supplied by petitioners to three California State Courts, and finally this Court, this lawsuit concerns a single issue: the constitutional adequacy of the notice procedure employed by the BZA of a particular use permit hearing. The arguments raised in this petition were all raised and considered below. Significantly, all state courts below employed the correct standard of review of the notice procedures: Mullane and its progeny. Simply, petitioners completely fail to identify constitutional error in the California Court of Appeal opinion below.

On January 27, 1987, the BZA,following a public hearing, granted the real party in interest, Loren Berry,a use permit allowing construction of a saw mill. This use permit was the final step in a long administrative approval process. The saw mill is presently operational and has been for several years.

The petitioners, persons who apparently own real property near the saw mill, challenge the notice procedure for the use permit hearing utilized by the BZA. This notice procedure consisted of posting eight formal notices of the hearing around the perimeter of Loren Berry's property. In addition, notice of the hearing was published in the Sonoma County Press Democrat newspaper on January 11, 1977. The Press Democrat is Sonoma County's largest newspaper.

Significantly, the procedures utilized by the BZA are specifically approved both by local ordinance (Sonoma County) and by California State statute. Both the Sonoma

County Trial Court and the California Court of Appeal, utilizing well-established standards of review explicitly determined that the noticed method utilized by the BZA was constitutionally adequate.

Notwithstanding that both the trial court and the California Court of Appeal utilized the correct standard of review -- indeed, the standard discussed at length by petitioners (Mullane) ; notwithstanding that the notice procedures utilized exceeded both state statute and local ordinance; notwithstanding that the adequacy of notice involved issues of fact decided adversely to petitioners, petitioners here have simply raised once again the sum total of all arguments previously presented and considered by California courts since 1979. This appeal presents absolutely nothing that has not been considered at least three times before. Indeed, a review of the California Court of Appeal opinion reveals consideration by that court of exactly the same law presented

in the petition.

This petition is therefore without merit, frivolous and should be denied.

ARGUMENTS FOR DENYING THE PETITION

I. The Courts Below Applied The Correct Standard Of Review To The Facts Before Them The Notice Employed was Constitutional .

Despite the vast amount of case law presented by petitioners concerning the standard of review for determining constitutionality of a particular notice procedure, this standard of review is actually well settled:

> An elementary and fundamental requirement of due process in any proceeding which is to:accord finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Emphasis added]
>
> Mullane v. Central Hanover Bank & Trust (1950) 339 U.S. 306, 314

Notwithstanding petitioners arguments, this standard of review was the one precisely employed by both the trial court as well as

the Court of Appeal (see Court of Appeal opinion, pages 4 and 5). The trial court's findings have been thoroughly reviewed and no error therein was demonstrated by petitioners. Instead, petitioners vaguely challenge the standard of review employed. This argument is without merit. The correct standard of review was applied.

In Greene v. Lindsey (1982) 456 U.S. 444, the court explained that in assessing whether constitutionally sufficient notice was provided, the trier of fact must "look to the realities of the case before [it]". See also Anderson National Bank v. Luckett (1944) 321 U.S. 233 (constitutional adequacy of notice must be read in the light of factual context). The courts below clearly applied the appropriate law in determing that the notice procedure utilized by the BZA was constitutionally adequate in terms of the factual context of this case.

II. Despite Appellants' Arguments Neither Mullane Nor Its Progeny Require Personal Notice: The Mullane Standard Was Applied By The Courts Below .

This is not a "no notice" type of case. The BZA utilized posting and publication notice procedures specified by Sonoma County ordinance and by California State statute. Petitioners argue that the notice procedures employed were constitutionally defective: petitioners argue that the constitution insists upon personal notice in this case.

However, despite petitioners' protestations, Mullane and its progeny simply do not require personal notice in all land use adjudication situations. Indeed, in Schroeder v. City of New York (1962) 371 U.S. 208, this court unambiguously held that posting of publication may be constitutionally adequate in the land use adjudication context. Indeed, in Schroeder, this court intimated that proper posting of notices would have been constitutionally adequate. Id. at p. 213. (See also Horn v. County of Ventura [1979] 24 Cal.3d 605, 618; the California Supreme

Court holding that posting of notice at the subjugated site may be appropriate at the discretion of the local government.)

In short, the standard of review set forth by this court does not hold that posting and publication is per se unconstitutional. To the contrary, every court considering that issue has held such notice procedures to be proper depending upon the factual context. The Mullane standard is fact specific. The Mullane standard was applied in this case. The facts, of course, cannot be redetermined by this court. Simply, both the trial court and the reviewing court below applied the Mullane analysis to the facts before them. Their holdings that the notice utilized by the BZA was constitutional should not be disturbed.

III. The Notice Procedure Utilized Exceeded Existing State Law And Local Regulation Granting This Writ Would Jeopardize Innumerable Administrative Hearings

The method of posting and publication

utilized by the BZA exceeded the method of notice expressly sanctioned by California State Law and Sonoma County local regulations.

California Government Code Section 65905 (applicable at the time of the notice herein; see court of Appeal opinion, note 1, page 5) provides:

> Whenever an application for a variance or a conditional use permit or other permit or revocation or modification of same or an appeal from the action taken thereon is submitted to the body or person charged with conducting a public hearing thereon, is submitted to the body or person charged with conducting a public hearing thereon, notice of hearing shall be given by notice through the United States mails, with postage prepaid using addresses from the last equalized assessment roll or by alternatively from such toerh records of the assessor or the tax collector as contained more recent addresses in the opinion of said body, or by both publication in a newspaper of general circulation in accordance with Section 65854 and posting said notice in conspicuous places close to the property affected. Procedure for mailing or posting of said notice shall be governed by the provisions of the local ordinance. [Emphasis added]

The County of Sonoma local ordinance, as referred in the last sentence of the pre-

ceeding Government Code Section, provides:

> Section 203.1(a): At least ten days' notice of all hearings required by Sections 26-208 and 203 [hearings on questions of permitted uses] shall be given by the Planning Director through the United States mails with postage prepaid to all persons shown on the last equalized assesment roll as assessors of parcels of real property within three hundred (300) feet of the parcel wherein the subject use is to be located or by publication in a newspaper of general circulation and posting in at least three (3) places on or near the property which is the subject of the hearing provided, however, that in the event of an appeal from an administrative determination by any official of the County of Sonoma in connection with the administration of this Chapter, the Planning Director need only notice the time and place of the hearing to the appellant in a manner he deems just and equitable. [Emphasis added.]

By publishing and posting notice, the BZA exceeded existing state law and local regulation. The BZA's compliance with state law and local notice procedures is uncontroverted. In Newberry Springs Water Association v. County of San Bernardino (1984) 150 Cal.App.3d 740, the Court held that:

> The legislature has *** [affirmed] the general principle that statutory requirements for public notice are fulfilled if the public agency makes a good faith effort to follow the procedures prescribed by law for giving notice.

Granting the petition herein would jeopardize the results of innumerable administrative hearings held pursuant to the statutory scheme.

IV. Post Adjudicatory Rights Contained In The Use Permit Merely Provide An Additional Basis For Finding The Notice Method Used Was Adequate

Appellants argue that the post adjudicatory rights provided in the use permit do not comport with due process requirements. Appellants cite numerous cases which hold that post adjudicatory rights may not be a substitute for due process in the first place. Those cases are inapposite here. As previously stated this is not a "no notice" case. Constitutionally adequate notice posting and publication was given.

In the California Court of Appeal's discussion, the Court notes that the use permit

provides for the County of Sonoma's continuing jurisdiction over the saw mill. This certainly is one relevant factor in considering the constitutional adequacy of the notice. The use permit's post adjudicatory rights granted to persons such as the petitioners are not viewed by the California Court of Appeal as a "substitute" for due process. Contrary to petitioners arguments, these rights do not "relax the personal notice standard." Mullane simply does not require personal notice. Post adjudicatory rights are relevant in determining whether the notice procedures utilized were constitutionally adequate.

V. Posting And Such For A Publication Are Especially Proper In Situations Involving Land Use Administration

All the cases cited by petitioners which hold publication and posting insufficient concern drastic taking of property interests. In fact, there is abundant authority upholding publication and such or posting of

in situations involving land use administration, where the results of such administration merely affect, rathern than deprive, land owners of property. For example, a number of New York cases reject the notion that due process requires mailed notice in land use proceedings. Zartman v. Reisem (1977) 399 N.Y.S.2d; Retzler v. County Executive (1971) 324 N.Y.S.2d 393. See also Cook v. Marple Tp. Zoning Hearing Board (Penn. 1980) 483 A.2d 1105, 1106 (published notice sufficient for hearing regarding construction of a private racquet ball club in a residential district).

Moreover, the Court of Appeals observance of the fact that the use permit retains jurisdiction with the County of Sonoma indicates adherence to the principal that the form of notice utilized depends upon the nature and severity of the land use. (See Court of Appeal Opinion, page 7).

CONCLUSION

The sole issue in this case is the

constitutionality of notice procedures utilized by the BZA in connection with a particular use permit hearing over nine years ago. Utilizing the well-settled principles of Mullane and its progeny, the trial, following a full evidenciary trial spanning five days, decided this factual issue adverse to appellants. Petitioners appealed, bringing forth the same arguments raised in this petition. In a thorough published opinion, the Court of Appeal considered each and eveyr argument and affirmed the trial court's holding.

Contrary to petitioners' claims, neither Mullane nor its progeny require personal notice. Contrary to petitioners arguments, both the trial court and the California Court of Appeal applied the Mullane standard of review in determining that the notice procedure utilized by the BZA was constitutionally adequate.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Dated: April 17, 1986

TARKINGTON, O'CONNOR & O'NEILL
A Professional Corporation

By _____
Gregory P. Einhorn
Attorney for Respondent
BOARD OF ZONING ADJUSTMENT
OF THE COUNTY OF SONOMA

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of 18 years and not a party to the within above-entitled action; my business address is 350 "E" Street, Santa Rosa, California 95404. On the below mentioned date, I served the within attached document(s) entitled: OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on the attorneys of record in said action by placing a true and correct copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Rosa, California, addressed as follows:

Joseph Baxter, Esq.
Main Street
Post Office Box 37
Duncans Mills, California 95430

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 18, 1986

LOIS HOPKINS

LAW OFFICES
TARKINGTON,
C CONNOR & O'NEILL
A PROFESSIONAL CORP
350 E STREET, SUITE 200
SANTA ROSA, CA 95404
(707) 576-1360